STATE OF MICHIGAN

IN THE SUPREME COURT

PATRICIA MERCHAND,

Plaintiff-Appellee,
v

SC No. 154622
COA No. 327272
LC No. 12-1343-NH
(Ingham Circuit Court)

RICHARD L. CARPENTER, M.D.,

Defendant-Appellant,
and

MID-MICHIGAN EAR, NOSE, AND THROAT, P.C., a domestic professional service corporation, jointly and severally,

Defendant.
_____/

DEFENDANT-APPELLANT RICHARD L. CARPENTER, M.D.'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

RHOADES McKEE PC

By: Mark E. Fatum (P38292)
Patrick B. Ellis (P67879)
Attorneys for Defendant-Appellant
Richard L. Carpenter, M.D.
55 Campau Ave. NW, Ste. 300
Grand Rapids, MI 49503
(616) 235-3500

PLUNKETT COONEY

By: Robert G. Kamenec (P35283)
Karen E. Beach (P75172)
Attorneys of Counsel for
Defendant-Appellant
Richard Carpenter, M.D.
38505 Woodward Ave., Ste. 2000
Bloomfield Hills, MI 48304
(248) 901-4068

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant Richard L. Carpenter, M.D. ("Dr. Carpenter" or "Defendant") refers this Court of the corresponding section in his Application for Leave to Appeal dated October 25, 2016, page viii.

STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM

Defendant refers this Court of the corresponding section in his Application for Leave to Appeal, pages ix-xi.

STATEMENT OF THE QUESTIONS PRESENTED

Defendant refers this Court of the corresponding section in his Application for Leave to Appeal, page xii.

STATEMENT OF FACTS

Defendant refers this Court of the corresponding section in his Application for Leave to Appeal, pages 1-17.

STANDARD OF REVIEW AND SUPPORTING AUTHORITY

Defendant refers this Court of the corresponding subsections in his Application for Leave to Appeal, found in Argument I, page 32, and Argument II, page 37.

THE NEED FOR SUPREME COURT REVIEW

Defendant refers this Court of the corresponding section in his Application for Leave to Appeal, pages 18-20.

ARGUMENT I

THE COURT OF APPEALS MAJORITY OPINION ERRED BY DETERMINING THAT THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING IRRELEVANT, AND ALTERNATIVELY FINDING INADMISSIBLE UNDER MRE 403, PLAINTIFF'S STANDARD OF CARE EXPERT'S TESTIMONY THAT HE HAD REVIEWED OTHER PATIENTS' MEDICAL RECORDS COMPILED BY DR. CARPENTER, PATIENTS WHO WERE PLAINTIFFS WHO HAD FILED LAWSUITS AGAINST DR. CARPENTER, FOR THE PURPORTED PURPOSE OF DEMONSTRATING THAT DR. CARPENTER'S RECORDKEEPING IN THIS CASE FOLLOWED A PATTERN OF INSUFFICIENT RECORDKEEPING WITH THESE OTHER PATIENT PLAINTIFFS.

Most notably, Plaintiff-Appellee Patricia Merchand ("Plaintiff" or "Ms. Merchand") fails to address – or otherwise actively avoids – two principal arguments made by Defendant-Appellant Richard L. Carpenter ("Defendant" or "Dr. Carpenter") in his pending application for leave to appeal ("Application"). First, Dr. Carpenter stressed that the Majority Opinion of the Court of Appeals never addressed the prejudice side of the MRE 403 prejudice versus probative value balancing test, yet nonetheless found an abuse of discretion by Judge Aquilina. Plaintiff

confirms this conclusion in her Answer and Brief in Opposition to Application for Leave to Appeal ("Answer"), page ix:

> "Defendant complains that, unlike the dissenting opinion, the Majority's written opinion did not specifically outline his claims of prejudice, and that this means the Court of Appeals must not have considered his arguments regarding prejudice or did not properly conduct a balancing test under MRE 403. *The Majority did not agree with Defendant's arguments; this doesn't mean the Majority did not consider them. Defendant's claims of prejudice from admission of other acts evidence is part of the Court record and was briefed extensively by Defendant. The Majority was apprised of the issues and properly considered the admissibility of the evidence.*"

(Emphasis supplied). So, according to Plaintiff, the Majority Opinion can find an abuse of discretion on an MRE 403 decision without first identifying and then rejecting the objecting party's claim of prejudice, even though MRE 403 by its very nature requires a balancing of whether such prejudice substantially outweighs the probative value of the proffered evidence. In so admitting, Plaintiff presents an untenable argument: an entire medical malpractice trial can be overturned based on the appellate court's disagreement with a discretionary decision of the trial court absent a full explanation as to how the trial court abused its discretion.

It is evident by this omission that Plaintiff cannot justify the Majority Opinion's finding of an abuse of discretion when Plaintiff cannot identify how the Majority Opinion considered and obviously rejected the prejudice predicted by the trial court, which had firsthand knowledge and was in the throes of the trial when this issue was presented. More fundamentally, there can be no finding of an abuse of discretion absent consideration of the prejudicial side of the MRE 403 equation. Indeed, what the Majority Opinion has done is to find that the trial court's MRE 403 weighing of the probative side and the prejudicial side of the proffered evidence falls outside the "principled range of outcomes," without assessing one entire side of the scale. It is a serious charge that a trial court abused its discretion, rather than merely made a mistake or even

committed clear legal error. The abuse of discretion standard requires the appellate court to provide deference to the trial court's decision, recognizing that oftentimes a court will properly exercise its discretion whether it grants or denies the requested relief – that is the nature of discretion itself.

Viewed from a different vantage, if abuse of discretion is dependent upon an erroneous assessment of the evidence, *Cooter Gell v Hartmax Corp*, 496 US 384, 405 (1990), an appellate court cannot legitimately find, let alone justify, an abuse without the appellate court itself providing an assessment of the evidence. Here, at best the Majority Opinion did half the job (which Dr. Carpenter contends was done erroneously, but that is addressed in his Application).

In the previous quotation taken from Plaintiff's Answer, Plaintiff suggests that the Majority Opinion simply did not agree with Defendant's argument, and that this does not equate to a failure to consider such arguments. Plaintiff then fails to follow up on this point through the remaining 51 pages of her Answer. At no point does ***Plaintiff*** provide a discussion of the prejudice found by the trial court to the admission of the proffered evidence. At pages 37-38 of the Answer, in a section entitled "The Probative Value of the Evidence Kept Out by the Court Substantially Outweighs the Danger of Unfair Prejudice," Plaintiff commits the same error as the Majority Opinion, namely failing to identify the danger of unfair prejudice to the defense by admission of the proffered evidence. Not once does Plaintiff address the various matters explained by Dr. Carpenter in his Application, when the bulk of that Application is devoted to a discussion of how the prejudice here substantially outweighed the probative value perceived by the Majority Opinion. In essence, Plaintiff doubles-down on the mistake made by the Majority Opinion. While arguing that the Majority Opinion must have considered the prejudice (Answer, page ix), Plaintiff infers that the Majority Opinion could have simply accepted Plaintiff's view

that such prejudice didn't exist, or was not substantially outweighed by the probative value, yet fails altogether to provide argument on this point. Plaintiff boldly asks this Court to deny leave to appeal on the thin reed that the Majority Opinion somehow accepted Plaintiff's argument as to how the prejudice here did not substantially outweigh the probative value, despite Plaintiff's failure to *ever* address this topic – not at oral argument, not in the appellate briefs at the Court of Appeals level, and certainly not in her Answer.

Confirmation of this point is evidenced by Plaintiff's failure to cite let alone distinguish this Court's observation in *People v Watkins*, 491 Mich 450, 486; 818 NW2d 296 (2012) (cited in Dr. Carpenter's Application, page 23):

> "Our conclusion that other-acts evidence admissible under MCL 768.27a remains subject to MRE 403 gives rise to the question of proper application. *As with any balancing test, MRE 403 involves two sides of a scale – a probative side and a prejudicial side*."

(Emphasis supplied). The Majority Opinion is necessarily faulty given its failure to identify and then weigh the prejudicial side of the MRE 403 equation. This critical flaw cannot be justified on the basis that "fairness and justice demands that the evidence be allowed to prevent a gross miscarriage of justice" (Answer, pp 37-38).

The second telling omission in Plaintiff's Answer is the failure altogether to address the considerable case law cited by Dr. Carpenter at pages 26-28 of his Application. These cases establish propositions which cut against the Majority Opinion's finding of an abuse of discretion in these circumstances. See e.g. *Sprint/United Mgt Co v Mendelsohn*, 552 US 379, 384 (2008) (under Rule 403, trial court "virtually always" in a better position to assess the admissibility of evidence); *People v Bahoda*, 448 Mich 261, 289-291; 531 NW2d 659 (1995) (same proposition); *Weil v Seltzer*, 873 F2d 1453, 1461 (DC Cir 1989) (new trial required when plaintiff allowed to present evidence of a defendant physician's treatment of five testifying plaintiffs); *Armstrong v*

Hrabal, MD, 87 P3d 1226, 1241 (Wy 2014) (Rule 403 prevents plaintiff from bringing before the court other instances of alleged malpractice, especially where there is a prospect of a series of mini-trials on each of the prior patient's cases). As one court has stated, "[T]he district court has wide discretion in steadying the Rule 403 seesaw." *Onujiogu v United States*, 817 F2d 3, 6 (CA 1, 1987). Indeed, Plaintiff has left unaddressed case law requiring an "extraordinarily compelling circumstance[]" that would lead to a reversal of a judgment about probative value and the unfair effect of evidence. *Freeman v Package Mach Co*, 865 F2d 1331, 1340 (CA 1, 1988).

The remainder of Plaintiff's arguments were anticipated and already addressed in Dr. Carpenter's Application.

ARGUMENT II

THE TRIAL COURT ERRED BY DETERMINING THAT PLAINTIFF HAD PROPERLY PLED RES IPSA LOQUITUR AND THAT IT APPLIED IN THE FACTS OF THIS CASE, UNDER WHICH RULING THE TRIAL COURT NOT ONLY ERRONEOUSLY INSTRUCTED THE JURY PURSUANT TO M CIV JI 30.05 [RES IPSA LOQUITUR], BUT ALSO REFUSED TO INSTRUCT THE JURY UNDER M CIV JI 30.04 [MEDICAL UNCERTAINTIES].

Plaintiff's arguments related to this Argument section were anticipated and already addressed in Dr. Carpenter's Application.

RELIEF

WHEREFORE, Defendant-Appellant requests this Court reverse the Majority Opinion, adopt the Dissenting Opinion, instruct that the Judgment of No Cause of Action is reinstated, in the alternative reverse and remand to the Court of Appeals for consideration of issues other than the other acts issue and res ipsa loquitur issue, and in the second alternative reverse on the res ipsa loquitur ruling and remand to the trial court for further proceedings.

Respectfully submitted,

RHOADES McKEE PC

By: Mark E. Fatum (P38292)
Patrick B. Ellis (P67879)
Attorneys for Defendant-Appellant
Richard L. Carpenter, M.D.
55 Campau Ave. NW, Ste. 300
Grand Rapids, MI 49503
(616) 235-3500

PLUNKETT COONEY

By: /s/Robert G. Kamenec
Robert G. Kamenec (P35283)
Karen E. Beach (P75172)
Attorneys of Counsel for Defendant-Appellant Richard L. Carpenter, M.D.
38505 Woodward Ave., Ste. 2000
Bloomfield Hills, MI 48304
(248) 901-4068

Dated: December 27, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

PATRICIA MERCHAND,

Plaintiff-Appellee,
v

SC No. 154622
COA No. 327272
LC No. 12-1343-NH
(Ingham Circuit Court)

RICHARD L. CARPENTER, M.D.,

Defendant-Appellant,
and

MID-MICHIGAN EAR, NOSE, AND THROAT, P.C., a domestic professional service corporation, jointly and severally,

Defendant.

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Monique M. Vanderhoff, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on December 27, 2016, she caused to be served a copy of the Reply Brief in Support of Application for Leave to Appeal, and Proof of Service/Statement Regarding E-Service upon:

Linda L. Widener (P48067)
Farhat & Story, PC
Attorneys for Plaintiff-Appellee
1003 N. Washington Avenue
Lansing, MI 48906
lwidener@farhatandstory.com

Counsel was e-served via TrueFiling

David R. Johnson (P33822)
Johnson & Wyngaarden
Attorneys for Defendant Mid-Michigan Ear Nose, and Throat, PC
3445 Woods Edge Drive

Counsel was e-served via the TrueFiling system

Okemos, MI 48864
drj@jwynlaw.com

Mark E. Fatum (P38292)
Patrick B. Ellis (P67879)
Rhoades McKee, PC
Trial Attorneys for Defendant-Appellant
Richard L. Carpenter, M.D.
55 Campau Avenue, NW, Suite 300
Grand Rapids, MI 49503
mefatum@rhoadesmckee.com
pbellis@rhoadesmckee.com

Counsel was e-served via the TrueFiling system

/s/Monique M. Vanderhoff
MONIQUE M. VANDERHOFF

Open.00400.50784.17863183-1